No. 427

JAN 10 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DeGRESAC MAUREL and G. SCHIRMER, INC.,

Petitioners,

against

THE SHANLEY COMPANY,

Respondent.

APPENDIX TO PETITIONERS' BRIEF.

History of Section 1, Subdivision (e) of Copyright Law.

NATHAN BURKAN,
Attorney for Petitioners.
WILLIAM J. HUGHES,
Of Counsel.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

Supreme Court of the United States

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DEGRESAC MAUREL and G. SCHIRMER, Inc.,

Petitioners,

against

THE SHANLEY COMPANY,

Respondent.

HISTORY OF THE PROVISION FOR MUSICAL PERFORMING RIGHT IN SECTION 1, SUBDIVISION (e) OF THE COPYRIGHT LAW.

The revision of the Copyright Laws which took the form of the Copyright Statute of 1909 was the result of recommendation made by the President to Congress in December, 1905.

The passage in the President's message referring to copyright revision is as follows:

> "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection;

they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the copyright office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

The inconveniences of the present conditions being so great an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions, as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration."

In the beginning of 1906 a bill to amend and consolidate the Acts respecting copyright was introduced in the House of Representatives under the designation "H. R. 19853." The same bill was introduced in the Senate as "S. 6330."

This bill contained the following provision with respect to musical works:

> "Section 1 (f). To publicly perform a copyrighted musical work, or any part thereof, or for purpose of public performance or the purposes set forth in subsection (b) hereof to make any arrangement or setting of such work, or of the melody thereof, in any system of notation."
>
> (Copyright Hearings, June 6-9, 1906, page V.)

The bill was discussed at a number of hearings before the Committees on Patents of the Senate and the House of Representatives sitting jointly.

At one of these hearings Mr. Albert H. Walker of New York criticised subdivision (f) of section 1 and made the following statement:

> "This is the situation of the law at the present time: If one of you gentlemen goes to church and joins in the singing of a hymn that is the subject of a copyright, you are liable to a penalty of $100 for the first time you join in that singing, and a penalty of $50 for every subsequent time, unless you yourself bought that particular hymn book at first hand from the publisher. That is the law now."
>
> (Copyright Hearings, June 6-9, 1906, page 173.)

At the same hearing Mr. Charles S. Burton made the following statement:

> "It is not believable that Congress intended to provide by this amendment that every member of a religious congregation joining publicly in the singing of a copyrighted tune should be liable to the penalties prescribed by this section; nor even that every member of a church choir, having purchased the copies of the copyrighted anthem, sold only for such purpose and useful only for such use, should be subject to these penalties, if the publisher omitted to grant expressly the permission to sing with the sale of a printed copy."
>
> (Copyright Hearings, June, 1906, page 201.)

In December, 1906, further hearings were held and at one of said hearings Mr. Arthur Steuart, Chairman of the Copyright Committee of the American Bar Association, appeared and recommended an amendment of subdivision (f). He made a statement and answered certain questions regarding his proposed amendment as follows:

> "Mr. Steuart. * * * Clause f ends with the words 'in any system of notation.' It was designed by those words to cover somewhat the same ground as is covered by clause g—in fact, to cover the whole ground that was covered by clause g. Clause g came in as the result of an earnest desire on the part of some people who wanted to make it very clear that this bill was intended to stop the use of music by mechanical

music-producing apparatus. Our criticism of clause g is that it attempts to encroach upon the patent law unnecessarily. We suggest that clause f be amended in this way:

'To publicly perform for profit a copyrighted musical work, or any part thereof, or for the purpose of public performance for profit, or the purposes set forth in subsection b (which is to sell, or so on) hereof to make any arrangement or setting of such work or of the melody thereof, in any system of notation or form of record in which the thought of an author may be recorded, and from which it may be read or reproduced.'

That will give to the composer and the music publishers everything which they could possibly get under the Constitution. That would be the copyrighting of a writing, and it would hold their compositions for every purpose for which they could be used which would result in their being produced as music to the ear or read by the eyes.

So far as the introduction of the word 'profit' is concerned, in the first line of that section, there has been a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music. Now, that is the present law. The present law is just as drastic as the present bill in the prohibition of the use of copyrighted music. I have conferred with many of the music publishers, and I find that none of them have any objection to the introduction of the words 'for profit.' There is no reason in the world why a child

or a regimental band passing down the street singing or performing a copyrighted piece of music should be penalized for the act when it is a mere matter of entertainment and a mere matter of the use of music which has been bought or learned. The thing to be protected is the business of the music publishers and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed. So that the introduction of the words 'for profit' in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free use and the free enjoyment of music."

Mr. Johnson. "How would it read then—that first line?"

Mr. Steuart. "To publicly perform for profit a copyrighted musical writing, or any part thereof, or for the purpose of public performance"—

Mr. Johnson. "For profit?"

Mr. Steuart. "Yes."

Mr. Chaney. "The words 'for profit' should be put in there, too?"

Mr. Steuart. "Yes; they might as well be put in at both places."

Mr. Johnson. "Because a band going down the street and playing a piece of music is giving a public performance."

Mr. Steuart. "Oh, yes; undoubtedly."

A Gentleman. "And the band gets paid."

Mr. Johnson. "Its performance is a public performance for profit."

Mr. McGavin. "If a man plays a piano for profit, would not this restrict him?"

Mr. Steuart. "It would restrict him if he played it for profit."

(Copyright Hearings, December 7-10, 1906, pages 161-162.)

At the hearings in December, 1906, Fromme Brothers, attorneys of New York City, submitted an argument in which the following statement occurred:

"It is also well known that all the public schools of the United States on the last day of the school year give a little musical entertainment of, say, half an hour duration, and in order to give that they either purchase copies from music dealers, borrow them from other schools, or rent them from music libraries, and they generally procure an orchestral arrangement to be used at this entertainment. Result, all the school children, the music teachers in the school, and the orchestra taking part would be subject to fine and imprisonment at the pleasure of the publishers. This also applies to all public singers, vaudeville performers, serio-comic singers, and orchestra in all the theaters in the United States."

(Copyright Hearings, December 7-10, 1906, page 171.)

At another session of the joint hearings, Mr. Tams, a music publisher, made the following statement:

"For years, gentlemen, the church choirs throughout the world have made it a practice on Christmas, Easter Sunday, and other festival days to give special musical services. And in order to give solemnity to these occasions they invariably use the local orchestra with the choir and the organ. In order to use them, they have to come to me for an orchestration, which means separate music sheets. The orchestra cannot play from the copies bought from the music stores. They have got to have specially prepared sheets, one for the clarinet, one for the cornet, and for the different instruments. After the performance those sheets have no commercial value. But under clause f, if this is enacted, and the choir gives its special services on Christmas or Easter, this music publisher can put in jail a whole choir, or the organist or the orchestra, and even the congregation, if they sing with them."

(Copyright Hearings, December 7-10, 1906, page 375.)

Thereupon the following colloquy took place between Mr. Tams and Mr. Currier, the Chairman of the Committee on Patents of the House of Representatives:

Mr. Currier. "As the bill now stands with the suggested amendments it would not have that effect; it would not affect schools and church choirs; it would affect no society that was not giving a public performance for profit."

Mr. Tams. "Even if that little society made one dollar profit it would be affected. I maintain that the custom that has prevailed up to the present time should continue."

Mr. Currier. "But the public schools and church choirs would not be affected if the amendments are adopted."

(Copyright Hearings, December 7-11, 1906, page 375.)

At the same hearings the Committee on Copyright and Trade-Mark of the Association of the Bar of the City of New York submitted a memorandum which contained the following:

"Section 1.—Subdivision (f).

"The public performance of a copyrighted musical work without permission of the copyright proprietor and *for profit* seems to this committee an obvious invasion of the rights of the composer. The words 'for profit' should be inserted in this subdivision, and its insertion will answer all the objections made to this section. There might be some question as to whether a performance of a musical work to a large number of invited guests was or was not a public performance. Or the rendering of some musical work in a public hall to charity; children, for example, and the real purpose of the law will be accomplished by inserting the words 'for profit.'"

(Copyright Hearings, December 7-11, 1906, page 403.)

In January, 1907, a revised bill was reported by the Committee on Patents of both Houses of Con-

gress. The revised House Bill was designated "H. R. 25133" and was accompanied by a report known as "Report No. 7083."

From this Report it appears that subdivision (e) of Section 1 of the revised bill was a consolidation of subdivisions (f) and (g) of the original bill and read as follows (page 9):

> "To perform the copyrighted work publicly for profit if it be a musical composition on which such right of public performance for profit has been reserved, as provided in section 14 of this act; and for the purpose of public performance for profit, and for the purposes set forth in subsection a hereof, to make any rearrangement or resetting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

The provision of Section 14 here referred to required the insertion of a notice on every published copy of a musical composition reserving the right of public performance.

This requirement and the reference thereto in Section 1, subdivision (e), were omitted from the final draft of the bill which was reported in the House of Representatives as "H. R. 28192" in February, 1909, and which was enacted without change.

Respectfully submitted,

NATHAN BURKAN,
Solicitor for Petitioners.

WILLIAM J. HUGHES,
of Counsel.

NOV 2
JAMES D.

No. 427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED de GRESAC MAUREL, and G. SCHIRMER, Inc.,

Petitioners,

vs.

THE SHANLEY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ASSIGN FOR HEARING.

Press of Fremont Payne, 47 Broad St.—Phones, 2277-78-79 Broad.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Petitioners, vs. THE SHANLEY COMPANY.	No. 427.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ASSIGN FOR HEARING.

This case and the case of John Church Co. vs. Hillard Hotel Co., No. 433, were brought to determine the question whether a performance of copyrighted music in a restaurant or hotel dining

room to which no admission fee is charged, and which performance is incidental to the business of the sale and service of food, is a performance for profit within the scope of the copyright law.

As the Church case has been advanced by the Court and assigned for hearing on January 8th next, it is respectfully submitted that it will conserve the time of the Court, and permit the presentation of different phases of the questions involved and the dispostion of both cases, if they can be heard together. Counsel for petitioners therefore move the Court to set the Herbert case down for hearing on January 8th next, with the Church case, in the time of one case.

Notice of this motion has been given to opposing counsel and to counsel on both sides in the Church case.

November 20, 1916.

NATHAN BURKAN,
WM. J. HUGHES,
Counsel for Petitoners.